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No. 90-183

IN THE

Supreme Court of the United States

October Term, 1990

ROBERT A. GOODEN,

Petitioner,

v.

THE TOWN OF CLARKTON, NORTH CAROLINA, *ET AL.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* Elizabeth L. Riley
Hoyt G. Tessener.
WOMBLE, CARLYLE,
SANDRIDGE & RICE
Post Office Box 831
Raleigh, North Carolina 27602
(919) 755-2100

Counsel for Respondents

Appellate Printing Services • Heritage Building • Suite 906 • Richmond, VA 23219 • (800) 642-7789

QUESTIONS PRESENTED

I. Whether Petitioner can be deprived of a property interest for Respondents' condemnation of a building that Petitioner did not own nor in which he possessed a constitutionally protected property interest?

II. Whether Petitioner can be deprived of a property interest for Respondents' denial of a building permit to repair a building that Petitioner did not own nor in which he possessed a constitutionally protected property interest when Petitioner failed to comply with the requirements necessary for a permit to issue?

III. Whether Respondents deprived Petitioner of any constitutional rights, privileges or immunities and if so whether those deprivations were executed in accordance with the Town's policy or custom?

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STATEMENT OF THE CASE

Petitioner brought this action against Respondents Town of Clarkton and various officials and employees of the Town of Clarkton, both in their individual and official capacities on June 15, 1987. Petitioner set forth his allegations in eleven counts. Petitioner alleged federal and constitutional claims (denial of right to due process, equal protection and unreasonable seizure), and state tort claims (malicious prosecution, abuse of process, defamation, assault and battery, negligent hiring and retention of employees, and intentional infliction of severe emotional distress). The facts are aptly set forth in the opinions of the Fourth Circuit

Court of Appeals and the District Court. (Petition, p. 1A). Nevertheless, pursuant to Rule 15 of the Supreme Court Rules, Respondents are compelled to point out misstatements, mischaracterizations and improper facts advanced by Petitioner.

Petitioner, Robert Allen Gooden (hereinafter "Petitioner") who described himself as a novelist, actor and screenwriter and a resident of California, alleged that he began operating his parent's business, a restaurant known as Lee's Grill, in Clarkton, North Carolina, in 1982. (Complaint at 2; JA 10). Petitioner alleged that he leased the Building containing Lee's Grill (hereinafter "the Building") from his parents. (Complaint at 6; JA 14). However, Petitioner has no written lease and paid no consideration or rent for use of the Building. (Petitioner Dep. Vol. II at 53).

On September 15, 1982, a fire damaged the Building. On that day, the Town building inspector, Defendant W.A. Hall (hereinafter "Hall") inspected the Building. (Hall Dep. Vol. I at 34). Hall inspected the Building three or four times. (Hall Dep. Vol. I at 39, JA 136). On the basis of his inspection, Hall determined that the Building was more than 50% damaged, pursuant to the standards set out by North Carolina in §§ 101(6)(d)(2) and 105.12 of the North Carolina State Building Code (hereinafter "the Code"), and ordered it condemned.[1] (Hall Dep. Vol. II at 38-39). This lawsuit originated from the condemnation and subsequent denial of a building permit to Petitioner to work on the Building.

During the next two years following the fire, the Building remained unused and vacant. On January 18, 1985 while the owner of the Building, Gertrude Gooden, was negotiating an insurance settlement for the damage to the Building, Hall sent Gertrude Gooden a letter stating that the Building could not be restored. (G. Gooden Dep. at 64-67). Likewise, on January 23, 1985, Wade Bray, the Bladen County Building Inspector, sent a letter to Mrs. Gooden independently confirming Hall's conclusion that the Building could not be restored. (Hall Dep. Vol. I at 38).

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[1] The N.C. State Building Code (N.C.S.B.C.) is promulgated under the authority of North Carolina General Statues. N.C.G.S. § 143-138 (1987). The Code sections correspond to specific statute sections. To avoid repetition, Defendants, will cite only to the Code sections.

Wade Bray inspected the Building at Perry Meshaw's request. (P. Meshaw Dep. at 18). Perry Meshaw was requested by Lee Gooden, Petitioner's father, to be an arbitrator in Gertrude Gooden's claim against the insurance company for damage to the Building. (P. Meshaw Dep. at 10).

In the following months, the insurance settlement for the Building was finalized. Along with Perry Meshaw, Layton Priest a local building contractor, acted as umpire in an arbitration to determine the damage to the Building. (Petitioner Dep. Vol. II at 94). Their conclusion was that the Building was over 50% damaged. (Priest Dep. at 9-11; P. Meshaw Dep. at 15). The Code requires buildings damaged in excess of 50% to comply with the requirements for new buildings. N.C.S.B.C. § 101.6(d)(2)(1984) (Pritchard Dep. at 20). Once over 50% damaged, the Building was condemned. Once condemned, it was a total loss. Therefore, Petitioner's mother, the owner, received over $70,000 of a $75,000 insurance policy on the Building. (G. Gooden Dep. at 71-81).

Notwithstanding the condemnation, the letters to Petitioner's mother and the insurance settlement, Petitioner began using the Building in the spring of 1985. (Complaint at 6; JA 14). Electricity was restored to the Building by an "elaborate drop cord" and Petitioner began showing videotapes to young adults and minors. (Petitioner Dep. Vol. I at 152-154). On June 12, 1985, Hall again sent Mrs. Gooden a letter informing her as follows: "The building which you own . . . has been deemed unsafe. As building inspector of Clarkton, I do hereby condemn this building by power of G.S. 160A-426. I request your presence at a public hearing on June 21, 1985 at 2:00 p.m., at the Clarkton Town Hall." (G. Gooden Dep. at 64-67; JA 96).

On June 20, 1985, the day before the hearing, Hall learned that the Petitioner was again working on the Building without a building permit. (Hall Dep. Vol. II at 147). Petitioner had dismantled a portion of the Building and used the dismantled portion to construct a porch across the street from the Building. (Petitioner Dep. Vol. III at 18). Therefore, pursuant to the Code, Hall ordered the Petitioner to cease dismantling the Building without a permit. N.C.S.B.C. § 105.8 (1984), (Hall Dep. at 23-24; JA 382). Petitioner put the stop order in his pocket and continued working in flagrant disregard of the stop order. (Petitioner Dep.

Vol. III at 17). Hall told Petitioner he would seek an arrest warrant if Petitioner continued working. (Smith Dep. at 54). Petitioner continued working, so Hall obtained a warrant for Petitioner's arrest to stop Petitioner from unlawfully and wilfully removing and reconstructing a portion of a condemned wooden building without first obtaining a building permit as required by N.C.G.S. § 160A-417. (Hall Dep. Vol. II at 97; JA 97). Petitioner admitted that he altered and moved the Building without a permit. (Petitioner Dep. Vol. III at 18).

The condemnation hearing was held on June 21, 1985. At the hearing, Petitioner, Petitioner's mother and her attorney attended and requested that Petitioner's mother be given additional time to demolish the Building so that the insurance settlement could be resolved. (G. Gooden Dep. at 80). It is undisputed that the owner of the Building never challenged the condemnation or requested a building permit. (G. Gooden Dep. at 44 and 62).

On March 10, 1986, after much controversy and a change in the composition of the Clarkton Board of Commissioners, the Board ordered that all building condemnations be rescinded including the condemnation of the Building.

Petitioner mischaracterizes Mr. Hall's letters to the Attorney General's office and to the N.C. Building Code Council. (Petition, p. 27). Hall explained that he wrote the letters seeking guidance because he was frustrated by Petitioner's repeated violations of the Code. (Hall Dep. Vol. I at 53-54; Hall Dep. Vol. II at 64).

On May 12, 1986, Petitioner asked for a building permit to perform further work on the Building, but submitted no plans and specifications as required by the Code. N.C.S.B.C. § 105.4(c)(1984). Consequently, Hall rejected Petitioner's application. Petitioner applied again the following day. Hall again refused Petitioner's request but said he would issue Petitioner a building permit when Petitioner complied with the Code by submitting the required plans or specifications. (Hall Dep. Vol. I at 79). Petitioner has never submitted any plans or specifications.

Petitioner relies on a statement executed by former police chief Ralph Smith and found on pages 105 and 106 of the joint appendix. (Petition, pp. 12, 15). The statement reveals that it was prepared and drafted by Petitioner based on his own recollection and personal knowledge. Nowhere does this statement indicate

that Smith is competent to make the statement or that the events recorded were based on his personal knowledge. Thus, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, the statement was inadmissible and should not have been considered. Fed. R. Civ. Pro. 56(e) (1982). In fact, Petitioner prepared every affidavit and statement included in the joint appendix, all of which fail to affirmatively allege competency and all of which contain inadmissible statements. In addition, Petitioner's assertions are not supported by the record. All of Petitioner's evidence, that he asserted as shocking to the conscience of the Court, was improper. For example, Petitioner relies upon an alleged recording of a telephone conversation between Clarkton Mayor Dan Meshaw and an attorney named William Richardson. Mayor Meshaw has expressly stated that the surreptitious recording was made without his knowledge or consent and that it was incomplete and inaccurate. (Meshaw Dep. Vol. II at 5-6). Further, Meshaw explained that his conversations with Richardson did not apply to Petitioner or the Building. (Meshaw Dep. Vol. II at 7-8). Yet, Petitioner urges this Court to rely upon this recording.

Petitioner does not contend that he was a member of a suspect class, nor does he allege to have been denied a fundamental right. He simply alleged that others similarly situated were granted building permits. (Complaint at 9; JA 17). Respondents do not deny that Petitioner twice requested a building permit. It is undisputed that issuance of the requested building permit required submission of plans and specifications to the Town building inspector, to which the Petitioner admits his failure. There are no facts that suggest others were similarly situated with Petitioner. Petitioner did not own the Building. (Petitioner Dep. Vol. I at 151). The Building was woodframe and in the primary fire district. (Hall Dep. Vol. I at 30). The Building was being occupied by Petitioner and others, including minors, despite its condition. (Petitioner Dep. Vol. I at 154). There is no evidence that anyone other than Petitioner needed to be arrested to enforce the Code. (Hall Dep. Vol. II at 96-97). On July 16, 1985, during the course of this controversy, Hall issued Petitioner a building permit to build a screen porch. (Hall Dep. Vol. II at 70; JA 381). Never before had the situation arisen where a woodframe building located in the primary fire district was damaged by more than 50%

and someone other than the owner sought to work on the Building. (Hall Dep. II at 96-97).

Petitioner makes many references to alleged statements and actions that formed the basis of his state tort law claims. Petitioner states that "Hall was going to . . . 'hang' Gooden in court. (Smith Dep. at 24; JA 159)" (Petition, pp. 22-23). Petitioner's cite to the joint appendix reveals that Hall never made any such statement, it was merely Petitioner's counsel characterization of Smith's impression. In fact, when asked by Petitioner's counsel if Hall told Smith that he was going to "hang" Petitioner in Court, Smith stated "No sir, I don't think so. I think it was more or less his attitude that lead [sic] me to believe that." (JA1 p. 159). Petitioner also states that Hall made defamatory remarks about him and that those defamatory remarks violated his constitutional rights. As the Fourth Circuit stated "[s]ince the district court found evidence, largely uncontradicted, that [Petitioner] had a reputation in the community for being a homosexual, the record does not support a cause of action for defamation." (Petition, p. 22A). If there was no evidence of the tort of defamation, surely the same lack of evidence does rise to a constitutional violation.

Petitioner attempted to advance a totality of conduct argument. However, almost every argument advanced by Petitioner pertains to Defendant Baysdon individually for which Petitioner has recovered over $55,000. Yet, Petitioner tries to bootstrap upon Baysdon's tortious conduct to hold the town liable for the same actions now characterized as constitutional claims. However, "nothing in the language of the due process clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Co. Dept. of Social Services*, ___ U.S. ____, 109 S.Ct. 998, 1003, 103 L.Ed. 2d 249 (1989). As one example of Petitioner's "totality" argument, he states that Baysdon used an "electronic eavesdropping device", and Hall observed and supervised Baysdon's activities. (Petition, p. 39). Again, there is no support in the record for these allegations.

Petitioner brought many claims all of which have been dismissed. Petitioner now asserts that this Court should grant his petition for writ of certiorari on his substantive due process claim. In support of his petition, Petitioner has altered his claims and the

underlying facts. As the lower courts' noted, Petitioner's substantive due process claim was based on the condemnation and denial of a building permit. Petitioner's assertion of a liberty interest violation was not pleaded in his Complaint and if it was, it was not deprived. (Petition, p. 40A). In order to establish a substantive due process claim for derivation of his property interest, Petitioner must present evidence of a property interest in the Building and in a building permit. After each court considered and rejected Petitioner's arguments, he misstates and mischaracterizes the facts to attempt to create a substantive due process claim. In essence, Petitioner asserts that actions that were not sufficient to go to the jury on an intentional infliction of emotional distress claim, a mere tort claim, are somehow sufficient to constitute a violation of substantive due process.

STATUTORY PROVISION INVOLVED

The following statutory provision is relevant to this case and set forth as follows:

42 U.S.C. § 1983:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REASONS FOR DENYING THE WRIT

Petitioner states that his claims are limited to substantive due process and that the Fourth Circuit and the District Court failed to address adequately his claims. (Petition, p. 4). These claims are purportedly based on Petitioner's version of the facts. Most of these claims now advanced by Petitioner were raised for the first time on appeal and were nevertheless incomprehensible, therefore, it was unnecessary for the lower courts to address them.

I. THERE ARE NO GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

As stated in Rule 10 of the Supreme Court Rules a petition for a writ of certiorari will be granted only for special and important reasons such as a conflict in the circuits or an important

question of federal law which should be settled by this Court. Petitioner asserts that there is a division among the circuits with respect to the application of substantive due process and an uncertain standard of proof in substantive due process claims which creates an important federal question. Petitioner fails to support these conclusions.

The application of substantive due process in the context of denial of building permits and zoning disputes has been consistent within the circuits. The analysis, whether explicitly stated or implicit from the facts, is aptly set forth in *Brady v. Colchester,* 863 F.2d 205 (2d Cir. 1988). In *Brady*, the owners of a building brought a civil rights suit against the town for procedural and substantive due process violations alleging political animus for the town's denial of a permit. The *Brady* court set forth a two-step analysis to determine whether a substantive due process violation had occurred.

First, the court stated that the plaintiffs must have a protected property interest within the meaning of the fourteenth amendment. *Brady*, 863 F.2d at 211. Just as the trial court in this case relied on the Fourth Circuit's pronouncement in *Scott v. Greenville Co.*, 716 F.2d 1409 (4th Cir. 1983), the *Brady* court also relied on *Scott* and stated in the context of plaintiffs' substantive due process claim:

> In the context of a zoning dispute, to state a claim under the fourteenth amendment for deprivation of "property" without due process of law a person must establish that he had a valid "property interest" in some benefit that was protectable under the fourteenth amendment at the time he was deprived of the benefit.

Brady, 863 F.2d at 211-12, citing *Scott*, 716 F.2d at 1418.

Second, if the threshold issue if answered affirmatively, only then is the conduct of the defendant reviewed. The *Brady* court stated:

> In zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions.

Brady, 863 F.2d at 215, and numerous cases cited therein (emphasis added). Most cases do not address the first step in the analysis because it is obviously met when the plaintiff is the property owner, so the focus is typically in the second step.

Petitioner claims there is a conflict in the circuits with respect to whether a property interest is required to bring a substantive due process claim based on a denial of property. In essence, Petitioner states that some circuits do not use the first step of the analysis. To the contrary, in the other circuits, the property owners were the plaintiffs. Thus, in those cases there was no reason to address the first step and the issue was the second step, substantive due process. This reasoning is consistently applied in *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983), *Brady v. Colchester*, 863 F.2d 205 (2d Cir. 1988), *Bello v. Walker*, 840 F.2d 1124, *cert. den.*, __ U.S. ___, 109 S.Ct. 176, 102 L.Ed.2d 145 (3d Cir. 1988), *Scott v. Greenville Co.*, 716 F.2d 1409 (4th Cir. 1983), *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985), *Harding v. County of Door*, 870 F.2d 430 (7th Cir. 1989), *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), *Marine One, Inc. v. Manatee Co.*, 877 F.2d 892 (11th Cir. 1989) and *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1987). Only the Sixth and Eighth, and Tenth Circuits have not addressed this issue. In the Eighth Circuit, the court stated that whether a denial of a permit can be a substantive due process violation is an open question. *Lemke v. Cass County, Nebraska*, 846 F.2d 469 (8th Cir. 1987)(en banc). In every case a proper person challenged the decision regarding the property.

Petitioner argues that the First Circuit is hostile to substantive due process claims. In *Chiplin*, the First Circuit stated that a mere denial of a permit did not rise to constitutional proportions yet recognized that additional factors may implicate constitutional concerns. *Chiplin*, 712 F.2d at 1527. Thus, the First Circuit recognizes a valid claim.

A proper person in all cases cited above was the property owner who had complied with all the statutory requirements for a permit to issue. In *Scott*, the proper person was a land developer who had an option to purchase the land and had complied with all requirements for a permit. *Scott*, 716 F.2d at 1412. Here, it is

undisputed that Petitioner was not the owner nor did he comply with the statutory requirements for a permit. As the Fourth Circuit Court of Appeals stated:

> [i]t simply cannot be argued that Hall was "arbitrary and capricious" in denying the permit, see *Marks v. City of Chesapeake*, 883 F.2d 308, 310-11 (4th Cir. 1989), since Plaintiff had no legitimate claim to it. Allegations of a denial of due process ring hollow unless plaintiff possesses some underlying right of interest of which he could be deprived.

(Fourth Circuit Court of Appeals Opinion, Petition, p. 12A)

Petitioner relies upon *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988) for his argument that an important federal question exists and review by this Court is necessary. He states that the lower courts need guidance on the standards to be applied in substantive due process actions. In *Silverman*, the D.C. Circuit was not addressing a denial of a building permit, and in any event the plaintiffs were the property owners. *Silverman*, 845 F.2d 1077. Nevertheless, the standard of review for substantive due process in this context has been enunciated many times by this Court. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797 (1974)(mere rational relationship test applies to zoning dispute). This standard has been applied in the circuits when deciding a substantive due process issue in this context. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988)(deny substantive due process only if actions are irrational). Therefore, there is no need for further guidance by this Court and there is no important federal question in need of review.

II. PETITIONER DID NOT POSSESS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE BUILDING

The substantive due process issue is not addressed by the lower courts because Petitioner could not overcome the threshold

issue of whether he had a constitutionally protected property interest in the Building sufficient to allow him to challenge the condemnation or have any entitlement to a building permit. Petitioner's misstatements of fact to create an impression of arbitrary conduct is not relevant because that issue was not reached because Petitioner failed to overcome the threshold issue.

The fourteenth amendment of the United States Constitution states that ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1 cl. 3 (emphasis added). Petitioner asserts that Respondents violated his substantive due process rights by condemning the Building, denying him a permit to work on the Building and by engaging in conduct shocking to the conscience of the Court. However, Petitioner did not own the Building when it was condemned nor when he requested a building permit. The Code provides Petitioner with a right to appeal any decision by the local building inspector, a right which Petitioner did not pursue. N.C.S.B.C. § 106.2 (1984). Petitioner knew that a permit would issue upon submission of the proper plans and specifications. N.C.S.B.C. § 105.4 (1984). Petitioner did not plead a violation of his liberty interest and even if he had, Respondents never deprived Petitioner of his career as an actor or his opportunity to operate a restaurant elsewhere. The use of the word "deprived" in the fourteenth amendment logically requires a person to have a property interest before a State can commit a deprivation of that interest. See *Brady v. Colchester*, 863 F.2d 205 (2d Cir. 1988).

Petitioner suffered no deprivation by virtue of the condemnation or the denial of the building permit. The Building was owned by Petitioner's mother. Petitioner produces no indicia of authority or agency from the owner to contest the condemnation. Property interests are created and defined by existing rules or understandings that stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). North Carolina's condemnation statute sets out only the statutory rights of the owner of a building. N.C.G.S. § 160A-428 (1987). North Carolina has held that a complaint was properly dismissed when the plaintiff failed to allege that she was the owner of property affected by the building inspector's decision. *Pigford v. Board of Adjustment*, 49

N.C. App. 181, 182-83, 270 S.E.2d 535, 536 (1980), *disc. rev. den.* and *app. dismissed*, 301 N.C. 722, 274 S.E.2d 230 (1981).

Petitioner alleged that his property interest is based on his status as a lessee, but Petitioner is unable to provide any evidence of a lease. In addition, Petitioner is unable to provide any state law that grants a property interest to a lessee. In North Carolina, the essential terms of a valid lease are parties (lessor and lessee), the real estate demised, the term of the lease, and the consideration or rent. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 146, 139 S.E.2d 362, 367 (1964). Petitioner failed to provide any evidence of the term of the lease or the consideration paid for the lease. Thus, Petitioner has at best only a month-to-month tenancy. See *Choate Realty Co. v. Justice*, 212 N.C. 523, 525, 193 S.E. 817, 819 (1937) (lease of uncertain duration is void and creates at the most a tenancy at will). However, a month-to-month tenancy does not create a property interest. *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 613, 322 S.E.2d 655, 657 (1984). Furthermore, in the analogous case of *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 371 S.E.2d 302 (1988), the North Carolina Court of Appeals stated that only the owner of the property can challenge a building inspector's decision. *Id.* at 239, 371 S.E.2d at 304-305 (emphasis added). Petitioner was, therefore, without standing to challenge the condemnation or the denial of the request for a building permit. See *Eaton v. City of Solon*, 598 F. Supp. 1505 (N.D. Ohio 1984).

The condemnation was rescinded by the Town Board on April 14, 1986 prior to the filing of this action, June 15, 1987. Article III of the Constitution requires the courts to limit review to actual cases and controversies. U.S. CONST. art. III, § 2. The controversy must exist through all stages of the proceedings, including the appellate stages. *United States v. Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). A case becomes moot when the allegedly wrongful behavior ends before the review. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972). Here, the condemnation was rescinded one year and two months before the lawsuit was filed. Therefore, even if Petitioner had a property interest in the Building and the condemnation deprived Petitioner of that property interest, the condemnation was rescinded over a

year before this lawsuit was filed. The entire condemnation issue is moot.[2]

In further evaluating Petitioner's substantive due process claim, the trial court properly determined that the Petitioner had no protectable property interest in the building permit he sought sufficient to give rise to rights under the due process clause of the fourteenth amendment. *Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983). Petitioner miscites numerous cases in arguing that a property interest is not required for due process protection. For example, Petitioner relies on *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) and *Bello v. Walker*, 840 F.2d 1124, *cert. den.* ___ U.S. ___, 109 S.Ct. 176, 102 L.Ed.2d 145 (3d Cir. 1988) to assert that a property interest is not necessary to bring a substantive due process claim for deprivation of a property interest. Petitioner argues that the courts in *Bateson* and *Bello* found a substantive due process violation without finding a procedural due process violation. In both *Bateson* and *Bello* the permit applicant had a property interest in the permit by owning the property and complying with the requisite statutes for the permit to issue. A procedural due process claim is for the deprivation of property without due process of law whereas a substantive due process claim is for merely the deprivation of property. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 678, 88 L.Ed.2d 662 (1986) (Stevens, J. concurring). Petitioner tries to persuade this Court to sidestep the threshold issue articulated in *Brady*, and *Marine One*, and implied in *Chiplin*, *Bello*, *Shelton*, *Harding*, *Bateson*, *Silverman*, and *Scott*. He argues that a substantive due process claim does not require a property interest. However, every circuit that has addressed this issue and in all cases cited by Petitioner, a person with a legitimate claim of entitlement such as the property owner or someone that has complied with the requirements for a permit to issue, has brought the claim. Therefore, a property interest existed in the claimant in all of these cases.

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[2] Any cause of action based on the condemnation of September 15, 1982 would be barred by the three year statute of limitations prior to the institution of this action on June 15, 1987. Plaintiff's rights, if any, must therefore be grounded on the alleged acts of the Defendants committed on or after June 15, 1984.

If Petitioner felt that he was unjustly denied a building permit, he had an opportunity to appeal Hall's decision to the North Carolina Commissioner of Insurance. N.C.S.B.C. § 106.2 (1984). The right to appeal is automatic and without cost. Additionally, Petitioner could have simply submitted the plans and specifications required for a permit to issue or brought a state court action. Petitioner's own expert, Bob Pritchard, stated that if a building is over 50% damaged, the only way you can repair it is upon submission of plans and specifications to the local inspection department. (Pritchard Dep. at 20). As the Second Circuit Court of Appeals stated in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985), a federal court should not sit as a zoning board of appeals.

Even if Petitioner had a property interest, the condemnation of the Building and denial of a building permit were not arbitrary and did not affect the Petitioner. Petitioner's attempt to create a scenario showing arbitrary or capricious conduct ignores the undisputed facts. Hall, and three other independent inspectors determined the Building to be at least 50% damaged. See N.C.S.B.C. § 101.6(d)(2)(1984). The local inspector has the discretion and authority to condemn, and the standard for condemnation is noncompliance with the code or an unsafe building. N.C.G.S. § 160A-426 (1987); N.C.S.B.C. § 105.12 (1984). Based on the "50% damaged" provision, his experience and his knowledge that the Building was unsafe and not in compliance with the Code, Hall condemned the Building. Further, the Building was used as a restaurant and most recently Petitioner used the Building to show videotapes to minors and young adults. Considering the past use and the intended use of the Building, Hall used his best judgment to condemn it for the protection of all concerned.

Petitioner asserts that his expert hired for this lawsuit, Bob Pritchard, evaluated the damage at approximately 20%. Petitioner's reliance on his hired inspector was irrelevant because his expert had not reached a final opinion as of the date of his deposition which was the evidence submitted to the District Court in opposition to Respondent's motion for summary judgment. (Pritchard Dep. at 10-11). At best, Petitioner's expert found the Building to be approximately 40% fire damaged. (Pritchard

Dep. at 62). However, the standard was not fire damage, it was total damage. See N.C.S.B.C. §101.6(d)(2)(1984). Nevertheless, the issue was whether the condemnation was arbitrary not which inspector was most accurate. Hall's conclusion was supported by an inspector selected by Petitioner's father, one independent inspector, one impartial umpire and the insurance settlement itself. Clearly, the condemnation was not arbitrary or capricious.

III. THERE ARE NO LIBERTY INTEREST ISSUES

Before the Court can reach the issue of how an interest was allegedly deprived, it must first determine if Petitioner had an interest that could be deprived. Petitioner had no property interest in the Building so the trial court granted summary judgment. On appeal, Petitioner attempted to obfuscate his claim by substituting a deprivation of liberty interest analysis for a deprivation of a property interest claim. Petitioner repeatedly cited cases where a substantive due process violation was found, but these cases uniformly applied to a deprivation of a liberty interest not a deprivation of property interest. *e.g. Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980)(corporeal punishment by public school officials).

Since Petitioner's substitution of a liberty interest analysis for a property interest claim failed in the Court of Appeals, he now asserts a liberty interest violation. *e.g. Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990)(discharge of police officer). Petitioner had not pleaded a liberty interest violation in his complaint, (Order at 9, n.4; JA 394). The lower courts properly determined that even if Petitioner had pleaded a liberty interest, there was no allegation that Petitioner was denied the opportunity to continue his career as an actor or in the restaurant business elsewhere in Clarkton or at the location of the Building upon properly applying for a building permit. *See Bishop v. Wood*. 426 U.S. 341, 347, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976) (a person is not deprived of his liberty interest when he remains free to seek other employment).

Petitioner now claims that Respondents' conduct shocks the conscience of the Court. To support this claim, Petitioner recapitulates all of his dismissed state and constitutional claims, including procedural due process, equal protection, and

unreasonable seizure, under his substantive due process claim. In effect, Petitioner argues that none of these claims individually rise to a constitutional violation yet somehow together they create a constitutional violation. As the Fourth Circuit stated "[t]he equal protection claim amounts to little more than a rehash of plaintiff's due process contentions." (Petition, p. 12a).

Petitioner's equal protection claim failed because there was no competent evidence that Respondents treated Petitioner differently from any similarly situated person. In fact, the town never dealt with a similar situation. (Hall Dep. Vol. II at 96-97). The Building is woodframe and located in the primary fire district of Clarkton. (Hall Dep. Vol. I at 30). As such, special provisions of the North Carolina State Building Code apply to the Building. N.C.S.B.C. §§ 105.3 and 302.4. Petitioner repeatedly refers to the other buildings in and around Clarkton. However, Petitioner presented no evidence that any other building in Clarkton is woodframe and within the primary fire district. Thus, there is no one similarly situated to Petitioner, and he has no equal protection claim.

Petitioner contends that his arrest for violation of North Carolina General Statute § 160A-417 constituted an unreasonable seizure and consequently, violated the fourth amendment. Petitioner was arrested for failing to obtain a permit to move or alter a building in the fire district and violating a stop order. N.C.S.B.C. §§ 105.2, 105.3 and 105.8 (1984).

The undisputed evidence revealed that the Building Code required a special permit to move or alter a woodframe building located in the fire district. N.C.S.B.C. § 302.4 (1984). The Building was located in the primary fire district. (Hall Dep. Vol. 1 at 30). Hall, the town building inspector, was informed that Petitioner was moving parts of the Building across the road. (Hall Dep. Vol. I at 77). Petitioner did not have a special permit. (Gooden Dep. Vol. III at 18). To enforce the Code, the building inspector has the authority to issue a stop order and bring judicial action. N.C.S.B.C. §§ 105.2 and 105.8 (1984). Pursuant to the Building Code, Hall ordered Petitioner to stop work and sought an arrest warrant. Further, Petitioner admitted that he moved parts of the Building without a permit. (Gooden Dep. Vol. III at 18). The charges were dismissed because Hall did not actually see Petitioner

move the parts and because the statutory section was incorrectly cited on the arrest warrant. (Hall Dep. Vol. I at 78; Hicks Dep. at 21). Thus, Petitioner's claims are without basis and his petition should be denied.

IV. PETITIONER DID NOT ALLEGE ANY ACTIONS THAT WERE EXECUTED IN ACCORDANCE WITH THE TOWN'S POLICY OR CUSTOM.

Petitioner styled his action as one for constitutional violations and 42 U.S.C. § 1983 violations. In any § 1983 action, a Petitioner must prove two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprives plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), overruled on other grounds, 474 U.S. 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986). This issue has not been reached by the lower courts because there was no conduct by any Respondent that deprived the Petitioner of rights, privileges or immunities secured by the Constitution or the laws of the United States.

While a municipality may be liable under § 1983 for certain actions, the Town of Clarkton is not liable for any of the individual Respondent's acts which Petitioner alleged deprived him of his constitutional rights. These individual Respondents were not acting under the policy or custom of the Town, and thus, did not subject it to § 1983 liability. A municipality may be liable under § 1983 only for acts which the municipality itself is actually responsible. Congress did not intend to make all torts by state officials federal claims. *Paul v. Davis*, 424 U.S. 693, 698-99, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405, *reh. den.*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

When only a single occasion of alleged constitutional violations is at issue, three other requirements were set out by the Supreme Court for finding a municipal policy unconstitutional. They are as follows: (1) only municipal officials who have final policy making authority may by their actions subject the municipality to § 1983 liability, (2) whether a particular official has

final policy making authority is a question of state law, and (3) the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 806 (1986).

In the case at bar, the individuals who made the decisions that Petitioner alleged violated his constitutional rights did not have final policy making authority. The Town Board of Commissioners is the final policy maker because only it is authorized to adopt ordinances affecting the Town of Clarkton. See CLARKTON, N.C., ORDINANCES ch. 1 (1954).

It is clear in this case that the Board of Commissioners exercised the final policymaking authority in the Town of Clarkton. Not only did it have the power to review condemnation decisions, it suspended the building inspector's power of condemnation and rescinded the condemnation of the Building before this lawsuit was filed. North Carolina's Commissioner of Insurance had final policymaking authority with respect to the building inspector's issuance of building permits, and North Carolina is not a party to this lawsuit. Thus, Hall had no final policymaking authorities, and his actions do not subject the Town to § 1983 liability.

Petitioner has failed to show the existence of the essential elements of a § 1983 action. First, there has been no showing of conduct that deprived the Petitioner of his rights or privileges secured by the constitution. Second, even if the court had found that any of Petitioner's subsequent claims should have survived summary judgment, the claim under § 1983 would still be precluded by Petitioner's failure to show any affirmative link or any policy adopted by officials of the Town of Clarkton.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted, this the 29th day of August, 1990.

By /s/ Elizabeth L. Riley

By /s/ Hoyt G. Tessener
Counsel for Respondents

Elizabeth L. Riley

NCSB#: 13942

Hoyt G. Tessener

NCSB#: 16068

OF COUNSEL:

WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Box 831
Raleigh, North Carolina 27602
(919) 755-2100